Nos. 87-1622, 87-1697 and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,

v. *Petitioner,*

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,

Respondents.

STANLEY WILKINSON,

v. *Petitioner,*

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

COUNTY OF YAKIMA, *et al.*,

v. *Petitioners,*

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION IN SUPPORT OF RESPONDENT

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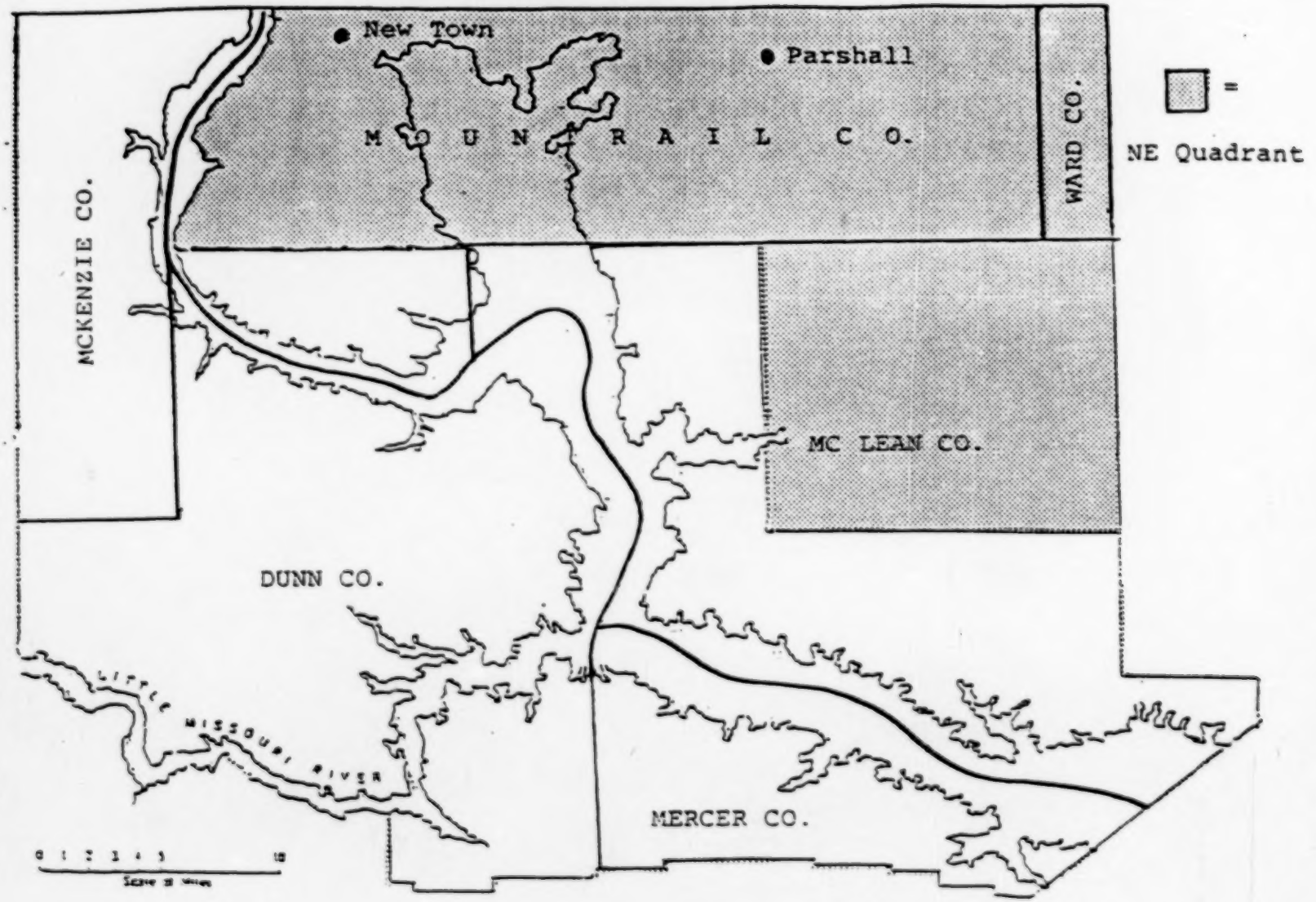
FORT BERTHOLD INDIAN RESERVATION



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INTEREST OF THE AMICUS CURIAE

The amicus curiae, Three Affiliated Tribes of the Fort Berthold Reservation ("Tribe"), is a federally recognized tribe residing in North Dakota. The Tribe occupies a reservation that has a land base nearly identical to that of the Respondent Yakima Indian Nation. That is, the Fort Berthold Reservation consists of a "closed" area (a portion of the reservation that was never opened to non-Indian settlement), and an "open" area or a portion of the reservation that was opened to non-Indian settlement. The closed area is virtually entirely composed of Indian-owned trust land as is the southern third of the open area. The open area is mostly composed of fee patented land occupied by non-Indians, but even here some Indians own trust land, and the Tribe owns large deposits of subsurface coal. See map inside front cover.

Recently, the Tribe passed a zoning ordinance for the entire Reservation governing both closed and open areas. See below at 6. In addition, the Tribe, to the exclusion of the State of North Dakota, was recently delegated regulatory authority by the Environmental Protection Agency governing the application of pesticides on all lands, both Indian and non-Indian, within the Reservation boundaries. See below at 8.

The Tribe urges affirmance of the decision below. The Tribe has a strong interest in preserving its sovereign authority over its Reservation and its governmental control over the use of lands anywhere within the entire Reservation, an authority implicitly recognized by the county governments.[1]

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[1] Four of the six counties in which the Reservation lies have expressly excluded the Reservation from their zoning laws. See below at 5. Notwithstanding that, three counties in which the Fort Berthold Reservation lies have filed in support of Petitioners. *See* amicus brief of Mountrail, McLean and Ward Counties, North Dakota.

The Tribe has a further specific interest in this case since certain amicus parties filing in support of the Petitioners are non-Indians residing on the Fort Berthold Reservation, including the exclusively non-Indian membership of the North Dakota Committee for Equality, a non-Indian organization which has historically and consistently opposed the exercise by the Tribe of its governmental powers on the Reservation. *See* amicus brief of the Citizens Equal Rights Alliance.

If the Ninth Circuit's decision is reversed, and the Tribe loses zoning control over the parts of its Reservation occupied mostly by non-Indians, the ensuing checkerboard jurisdiction is quite likely to lead to inharmonious and incompatible land use regulations by the Tribe and the local county governments. The Tribe supports the Respondent Yakima Nation and urges that the Ninth Circuit be affirmed. The written consents of Petitioners and Respondent to the filing of this amicus brief are on file with the Clerk.

PARTY SUPPORTED

The Three Affiliated Tribes strongly urge affirmance of the Ninth Circuit's decision in favor of the Respondent Yakima Indian Nation.

ARGUMENT

I. UNIFIED ZONING REGULATION IS ESSENTIAL ON INDIAN RESERVATIONS.

A. Facts Pertaining to the Fort Berthold Reservation.

The Three Affiliated Tribes is a federally recognized tribe consisting of the Mandan, Hidatsa and Arikara Tribes of Indians. Currently the Tribe consists of about 6,000 enrolled members. The Tribe is organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476. The Tribe has a constitution and bylaws approved by the Secretary of the Interior on June 29, 1936. Its government consists of an elected tribal council and a comprehensive code of laws governing the Reservation. The Tribe also has an executive branch (the tribal chairman and the tribal agencies) and a judicial branch (court and judges).

The Tribe entered into a Treaty of Peace and Friendship with the United States in the Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749, II Kappler 594. This Treaty recognized the Tribe as owning a vast territory in North and South Dakota, Montana and Wyoming. By a series of Executive Orders in 1868, 1870 and 1880, and a cession consummated by the Act of March 3, 1891, 26 Stat. 1032, the Tribe's Reservation was reduced to approximately one million acres in west central North Dakota, which it has remained ever since. See map.

In 1910, Congress opened the northeast half of the Reservation [2] to non-Indian settlement. Act of June 1, 1910, 36 Stat. 455.[3] White settlers subsequently occupied

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[2] That is, lands lying north and east of the Missouri River. The sale of land within the Reservation boundaries does not remove the land from the Reservation. *Seymour v. Superintendent*, 380 U.S. 359 (1962); II Opinions of the Interior Solicitor 2009, M-36802 (1970).

[3] The Act reserved a portion of the open land (the southern third thereof) for allotment in trust to tribal members. The allotments

the northeast two-thirds of the opened area (called the "Northeast Quadrant"). Some allotments were also made in the Northeast Quadrant. There are two largely non-Indian towns located in the Northeast Quadrant, New Town (pop. 1335) and Parshall (pop. 1059). See map. Tribal trust and fee lands and individual Indian trust and fee lands are located in both towns.[4]

Disputes have arisen concerning the extent of the Fort Berthold Reservation boundary and its attendant jurisdiction. For example, in *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), the Eighth Circuit held that the 1910 Act did not result in the disestablishment of the Northeast Quadrant of the Reservation, and therefore the City of New Town did not have criminal jurisdiction over Indians committing crimes within the town's general jurisdiction. *Id.* at 127.[5]

In terms of land use and zoning, so far only potential conflicts exist. The Reservation lies within the boundaries of the counties of McLean, McKenzie, Mountrail, Dunn, Mercer and Ward (see map). Of these six counties, five have passed zoning ordinances. Each ordinance expressly states as its purpose the promotion of the health and general welfare of the county citizens. *See* Ward Co. Zoning Res. No. 6, Art. 1, § 1; Mercer Co. Zoning Ord. § 1.2; McLean Co. Zoning Ord. § 1.2; Zoning Ord. Dunn Co., N.D., Art. I, § 1.3; Mountrail Co. Zoning Ord., Art. 1, § 2.

Of the five counties with zoning ordinances, four (McLean, Ward, Dunn and Mercer) have expressly excluded Reservation lands from the application of their

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were made before the non-Indians were allowed to select land. In addition, the rights to the coal deposits in portions of the opened area were reserved to the Tribes.

[4] In New Town, Indian owned land constitutes 28% and in Parshall, Indian owned land constitutes 29% of the area.

[5] *Cf. also Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978).

zoning ordinances. One county—McLean—expressly recognized the tribal zoning ordinance of the Fort Berthold Reservation. McLean Co. Ord., § 1.3. One county—Mountrail—has implicitly asserted jurisdiction over Reservation lands.[6] In addition, the towns of New Town and Parshall have also enacted municipal zoning ordinances. *See* Parshall Zoning, Ch. 12; New Town Zoning Ord., Ch. 7.

The Tribe very recently enacted a tribal zoning law which applies to all lands within the Reservation. The Code has as its stated purpose the need to protect the stability of reservation lands and "to otherwise promote the public health, safety, morals and general welfare" within the boundaries of the Reservation. § 2. There are five zoning classifications: (1) Agricultural; (2) Recreational; (3) Reserved Status Land (Cultural and Wildlife Resources); (4) Commercial and Energy Development; (5) Residential.

Of these, the classification unique to the Tribe—nothing comparable is found in any county zoning ordinance—is the Reserved Status zone. The Reserved Status zone is established "to insure continuation of the Tribal Natural Resources and to insure the treaty rights of Tribal members to have an area in which they may camp, hunt, fish and pursue the traditions of their culture. Protection and preservation of these resources is a necessity for the Indian traditions and cultural way of life." Tribal Zoning Ord. § 12. Its stated purpose is "to prevent uncontrolled development which could result in irreversible damage to important Tribal items such as historical items, cultural resources, religious artifacts, and wildlife habitats." *Id.* Specifically, the Tribe is seeking to prevent development in the Reserved Status

[6] Its ordinance provides it is applicable to all incorporated and unincorporated lands in the county. Requests for exclusion by incorporated or unincorporated areas that have adopted zoning ordinances are permitted. Mountrail Co. Zoning Ord., Art. II, § 1.

zone in order to preserve traditional tribal grounds and other cultural sites.

At this time, the Tribe has recently zoned for Reserved Status certain tribal, individual trust and non-Indian fee lands along the Missouri River and Lake Sakakawea, including areas in the Northeast Quadrant, that are sites of historical, cultural and religious significance such as teepee rings, ancestral burial grounds and old village sites. *See* Tribal Land Use Plan and Code, Sec. 12. There is also a parcel of tribal land zoned Reserved Status, east of New Town, that holds a community hall where traditional tribal ceremonies, dances and rituals occur. In addition, the Tribe has designated for Reserved Status certain lands in the Northeast Quadrant, both Indian and non-Indian, that were former burial sites. Skeletal remains and artifacts have also been recovered from non-Indian lands and these lands have been designated Reserved Status. This is a particularly important issue to most tribes since such remains and artifacts have often been turned over by the non-Indian landowner or tenant to state historical societies and universities for study rather than returned to the Tribe for reburial. The Tribe is attempting to protect these lands and remains from this type of abuse.

Finally, the Tribe is actively regulating commercial recreational facilities on lands fronting on Lake Sakakawea to prevent overcrowding and overbuilding. *See id.* Sec. 10.

The Tribe has enacted other regulatory codes applicable to the entire reservation, including laws applicable to beekeeping; alcohol control; fish, game and recreation; oil and gas; Indian preference and employment; personal property repossession (geared to regulation of non-Indian creditors); business licensing; and pesticides.[7]

[7] The Tribe recently entered into an agreement with an oil and gas company whereby the company agreed to be bound by all

In an area closely related to zoning and land use—viz. environmental laws—the Environmental Protection Agency ("EPA") has recently delegated its authority to control the application of pesticides under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) to the Tribe to the exclusion of the State of North Dakota.[8] 7 U.S.C. § 136b. The Tribe will control the application of pesticides on the entire Reservation, both trust and fee lands. 51 FR 22860 (1986). This delegation was initially opposed by non-Indian landowners who asserted they had no voice in tribal government and that the delegation of jurisdiction was unlawful. 51 FR 22861 (1986). The EPA responded that it was not delegating jurisdiction to the Tribe, because the Tribe already had inherent jurisdiction. In addition, the Tribe provided an administrative appeal process to answer the concern that the non-Indians had no voice in tribal government. *Id.* The non-Indian landowners are now operating on the assumption that the Tribe does have authority to regulate pesticides.

B. A Single Reservation Should Be Governed By a Single Zoning Law.

It is the Tribe's position that the Ninth Circuit's finding of a strong tribal interest in zoning is obvious and powerful, and clearly meets the test set forth in *United States v. Montana*, 450 U.S. 544 (1981). In *Montana*, the Court held that a tribe retains inherent sovereignty and authority to regulate conduct of non-Indians on fee

applicable tribal laws governing mineral exploration and development activities imposing requirements for Indian preference and employment contracts, both on fee and trust land, in the Northeast Quadrant of the Reservation.

[8] Since 1981, and in cooperation with EPA, the Tribe has actively regulated the application of pesticides on all lands, both Indian and non-Indian within the boundaries of the Reservation. This delegation, in 1985, was the first formal delegation by the EPA to a Tribe under FIFRA.

land where the conduct "threatens . . . the health or welware of the tribe." *Id.* at 566. Under this test, zoning laws must be applicable to everyone, including non-Indians on fee land. That is, *zoning and land use planning are health or welfare based laws that must be comprehensive within a contiguous area* like a reservation. To permit checkerboard zoning is to defeat the entire purpose of land use planning since there is a natural conflict between a tribe's interest in preserving its natural and historical resources and the environment of its reservation[9] and the desires of non-Indian developers, and local and state governments that are willing to encourage such development.[10]

In addition, though the problem of the division of zoning authority between two governments may not seem unduly burdensome, on reservations with a large land base, like Fort Berthold, the situation is exacerbated by multiple county and municipal zoning authorities. Non-Indian land on the Fort Berthold Reservation would be governed by eight different zoning ordinances, depending on which county or town the land was in, each of which conflicts to some extent with the Tribe's own ordinance. See above at 6. Trust land would be governed by the

[9] It is clear that all tribes have an interest in protecting sacred and historical areas, cemeteries, etc. In addition, many reservations are endowed with valuable resources and environments generally undisturbed by development and attempts at urbanization. *See Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900, 903 (10th Cir. 1982). Such interests do not necessarily have the same priority with non-Indians and local governments wanting to develop such lands as is the case with both Petitioners Brendale and Wilkinson—the desire to develop the land is their overriding consideration.

[10] Indeed, to permit local non-Indian authorities to zone Indian lands is to encourage the further dissolution and deterioration of the reservation trust land base. Just as voracious settlers once scrambled for ownership of Indian lands, the non-Indian fee owners now seek to develop their property without regard to the preservation of certain aspects of the Reservation.

tribal code so the potential exists for the Fort Berthold Reservation to be governed by nine governments in zoning. This is an unwieldly and unworkable situation. The Tribe's interests could never be protected in such a situation. And this is not a theoretical threat.

That the interests of tribes rate a low priority or conflict with States' interests in zoning and other health and safety matters is abundantly clear from a review of recent case law.

In *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982), non-Indians owning fee patented lands on the Wind River Reservation sought to develop their lands by subdividing it into residential lots. This plan was approved by the county government's Planning Commission. However, this proposed development would have occurred near areas where traditional tribal ceremonies were held, and near other Indian activities that the Court found were substantial. Apparently, the County Planning Commission gave no consideration to such concerns. The development was prevented only by that Court's intervention and holding that the Tribe's ordinance had to apply to the non-Indian fee land in the interest of tribal sovereignty and through the recognition that the Tribe had a legitimate interest in preserving the character of its land through comprehensive zoning on its *entire* reservation.

In *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1976), Indians sought to place mobile homes on their trust lands zoned General Agricultural under the county's ordinance. *Id.* at 657. To obtain a variance, a fee had to be paid. In addition, permits for various utilities had to be obtained by payment of a fee. Because the county refused to issue the permits without payment, which the Indians could not afford, utilities, water and sanitation services were denied to the Indians who were to reside in the development. *Id.* at 658. The Court held

the county did not have jurisdiction under P.L. 280, pointing out that there is a tension between Indian and non-Indian interests in development, but as to Reservation lands, the Indians' interest and priorities in providing housing and in controlling development of the reservation necessitated the exclusion of county zoning. *Id.* at 664.

In *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987), a mobile home park was operated by a non-Indian on alloted Indian trust land in the Agua Caliente Reservation. The Indian allotment owners were to receive a portion of the rental payments for the mobile homes as compensation for the use of their allotment. The City of Rancho Mirage enacted a rent control ordinance (a land use law) imposing limits on rent increases on all mobile home parks, and attempted to enforce this ordinance against the allotment owners. *Id.* at 1389. The Court held that such land use regulation was within the inherent sovereign authority of the Tribe, and that concurrent jurisdiction would "nullify" the Tribe's authority. *Id.* at 1393. Thus, the Court held, the City's ordinance could not apply.

In *Governing Council of Pinoleville Indian Community v. Mendocino Co.*, 684 F. Supp. 1042 (N.D. Cal. 1988), the Pinoleville Indian Community Tribal Council (Council) placed a moratorium on industrial development on all lands within its reservation in order to work up a plan for development and a zoning ordinance. The non-Indian landowner applied to the County to operate an asphalt and a cement plant on its lands located within the reservation. The County approved the application over the objection of the Council. *Id.* at 1044. The Tribe sought an injunction arguing that under the *Montana* test, its interests were directly affected by the industrial use. Among other things, the plants would be extracting gravel from a creek designated for protection by the Tribe as a salmon spawning ground. The Court granted

the injunction finding the Tribe's interest substantial. *Id.* at 1045.

In *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982), the record showed that the State of Washington was requested to enforce its building and safety regulations against a non-Indian general store on fee patented property within the Quinault Reservation. When the state failed to do so, the Tribe sought to enforce its own tribal code. The Ninth Circuit affirmed the application of tribal law as a regulation necessary to the protection of the health and welfare of the Tribe. *Id.* at 366. *See Washington v. U.S. Environmental Protection Agency*, 752 F.2d 1465, 1470 (9th Cir. 1985) (where tribes expressed fears of reservations becoming "dumping grounds" if the state was granted control over hazardous waste disposal on reservations; such authority was denied the state as without jurisdiction). *See also Blue Legs v. U.S. Environmental Protection Agency*, 668 F. Supp. 1329, 1339 (D.S.D. 1987) (where the Court held that the Oglala Sioux Tribe and not the EPA or the state had the inherent sovereign authority to enforce federal laws concerning solid waste disposal on the Reservation).

From this brief review it is clear that conflicts can and will arise between Indian and non-Indian interests in land use planning and zoning. It is also clear that if a tribe's sovereignty is to be preserved and if the health and safety and other interests of a tribe are to be protected, control over the entire reservation is essential.

C. Single Reservations Are Already Governed By Single Tribal Environmental Laws.

In an area related to zoning—environmental regulation—Congress has clearly found that tribal sovereignty requires control over the entire reservation, including non-Indian, feepatented land. In 1984, the EPA issued a policy statement concerning environmental programs on reservations that emphasized tribal sovereignty and

the recognition that as an aspect of that sovereignty, tribes should exercise control over their reservation environment. EPA, Indian Policy Statement (Nov. 1984); 15 Environment Rptr. 1312 (Summary).

In 1986, Congress affirmed the EPA policy by amending the Clean Water Act, 33 U.S.C. § 1377, the Safe Drinking Water Act, 42 U.S.C. § 300f, and the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. 9601-9675, to expressly permit qualifying tribes to assume jurisdiction over environmental programs on reservations regardless of land ownership.

Indeed, the legislative history of the Clean Water Act indicates that Congress expressly considered non-Indian fee patented land and delegated authority to tribes over these lands as a necessary aspect of tribal sovereignty. A memorandum describing the Indian provisions stated: "A. Indian tribes are self-governing, exercising limited powers of inherent sovereignty within their reservations. B. *In the exercise of that power, Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources.*" 133 Cong. Rec. H184 (1987). (Emphasis added.)

Zoning laws and environmental laws are offspring of the same policy considerations, that is, the health, safety and general welfare of the populace. Congress has recognized that tribes need to control their environment. Such policy should apply equally to zoning, which is a type of environmental regulation.

On the Fort Berthhold Reservation, the EPA delegated to the Tribe the authority, to the exclusion of the state, to regulate the application of pesticides over the *entire* reservation pursuant to FIFRA. 7 U.S.C. § 136b; 51 C.F.R. 22860 (1986). See p. 8 and n.8 above. This delegation was initially opposed by non-Indians holding

fee land on the Reservation, but there is now general acceptance of the Tribe's sovereign authority.[11] This delegation is a very real and practical recognition by the federal government that tribes must have authority over their entire reservation if they are to effectively administer these federal environmental programs to meet their unique needs and interests.

The same conclusion must be made with respect to zoning laws.

Respectfully submitted,

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[11] A related area of regulation relevant to the Tribe is coal mining. The Tribe owns vast areas of coal deposits located under fee land in the open area. Congress has placed authority over mining in the hands of the Secretary of Interior, not the State, until a suitable method of transferring such authority to tribes can be determined. 30 U.S.C. § 1300.